


ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

The 2003 Intangible Cultural Heritage Convention in Armed Conflict: An integrated reading of obligations towards culture in conflict

Ashrutha Rai* 

University of Cambridge, Cambridge CB3 9DZ, United Kingdom
Email: ar944@cam.ac.uk

Abstract

International law today recognizes that cultural heritage includes not only tangible but also intangible cultural heritage, encompassing traditions, customs, practices, and beliefs. While protections for tangible cultural heritage have existed since at least the nineteenth century, only relatively recently has the law gone beyond piecemeal human rights protections and extended direct and specific treaty protections to intangible cultural heritage through the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. The push for this Convention was linked with broader discontent within the Global south at the prioritization of Eurocentric ‘monumentalism’ in international cultural heritage law. Nevertheless, in situations of armed conflict, the emphasis reverts to protection of tangible cultural heritage as international humanitarian law does not go beyond general civilian protections to directly address the protection of intangible cultural heritage in conflict. While the 2003 Convention provides for emergency assistance, its broadly-worded terms do not indicate the shape its other obligations would take in armed conflict or the manner in which they would interact with rules governing the conduct of hostilities. This article examines, first, the degree and extent to which the 2003 Convention’s various obligations in relation to safeguarding intangible cultural heritage circumvent de-prioritization and continue to apply in conflict; and second, the manner in which they can be integrated with rules of international humanitarian law to better protect intangible cultural heritage during active hostilities.

Keywords: armed conflict; intangible cultural heritage; systemic integration; treaty interpretation; 2003 Intangible Cultural Heritage Convention

1. Introduction

On 29 June 2012, following a tense stand-off, an extremist armed group called Ansar Dine took control of the ancient city of Timbuktu, Mali and systematically set about destroying the city’s cultural heritage.¹ Among the most egregious acts were the destruction of fourteenth century Sufi shrines and mausoleums² and a complete ban

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¹Z. Flood, ‘Trouble in Timbuktu as Islamists Extend Control’, *Telegraph*, 29 June 2012, available at www.telegraph.co.uk/news/worldnews/africaandindianocean/mali/9365390/Trouble-in-Timbuktu-as-Islamists-extend-control.html.

²‘Mali Islamists Destroy Tombs at Famous Timbuktu Mosque’, *Reuters*, 10 July 2012, available at www.reuters.com/article/us-mali-crisis-timbuktu-idUSBRE8690O420120710.

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on music.³ Mali is a party to the Convention concerning the Protection of the World Cultural and Natural Heritage, 1972 (World Heritage Convention) and the shrines had been on the World Heritage List since 1988.⁴ Their destruction provoked international outcry, including from the World Heritage Committee, the body overseeing implementation of this Convention.⁵ It was also seen as a violation of international humanitarian law (IHL), including the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954 (1954 Hague Convention), to which Mali is a party.⁶ In a ground-breaking 2016 case, it went on to form the basis of the first conviction for destruction of cultural heritage at the International Criminal Court (ICC).⁷ In the same year, the reconstruction of the shrines, partially funded by the United Nations Educational, Scientific and Cultural Organization (UNESCO), was completed.⁸

Meanwhile the ban on music was mentioned briefly in reports to the United Nations Human Rights Council and General Assembly (UNGA),⁹ but received far less legal attention. This was despite the fact that Mali is a party to the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (Intangible Heritage Convention or 2003 Convention).¹⁰ This treaty, in its Part I, defines its purpose as being ‘to safeguard’, ‘ensure respect’, and ‘raise awareness’ of ‘intangible cultural heritage’, which includes:

- (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
- (b) performing arts;
- (c) social practices, rituals and festive events;
- (d) knowledge and practices concerning nature and the universe;
- (e) traditional craftsmanship.¹¹

In Part II, it establishes a ‘General Assembly of States Parties’ and an ‘Intergovernmental Committee ... composed of representatives of 18 States Parties, elected by the ... General Assembly’. It creates two categories of obligations: obligations upon states parties, in Part III, to safeguard intangible cultural heritage at the national level;¹² and mechanisms at the international level in Parts IV–VI, that states both participate in and benefit from,¹³ including international lists and the possibility of requesting international assistance for safeguarding heritage.¹⁴

³A. Morgan, ‘Mali: No Rhyme or Reason as Militants Declare War on Music’, *Guardian*, 23 October 2012, available at www.theguardian.com/world/2012/oct/23/mali-militants-declare-war-music.

⁴1972 Convention for the Protection of the World Cultural and Natural Heritage, 1037 UNTS 151; United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage List, ‘Timbuktu’, available at whc.unesco.org/en/list/119/.

⁵World Heritage Committee Condemns Destruction of Mali Sites’, *UN News*, 3 July 2012, available at news.un.org/en/story/2012/07/414722.

⁶1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 215; International Council on Monuments and Sites, ‘ICOMOS Statement on Mali’, 2 July 2012, available at www.icomos.org/en/178-english-categories/news/490-icomos-statement-on-mali.

⁷*Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order of Trial Chamber VIII, ICC-01/12-01/15, 17 August 2017.

⁸UNESCO, ‘900-Year-Old Consecration Ceremony Held for the Timbuktu Mausoleums’, 4 February 2016, available at whc.unesco.org/en/news/1430/.

⁹UNGA, Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Mali, UN Doc. A/HRC/22/33 (7 January 2013), para. 44; UNGA, Report of the Special Rapporteur in the Field of Cultural Rights, UN Doc. A/71/317 (9 August 2016), para. 37.

¹⁰2003 Convention for the Safeguarding of the Intangible Cultural Heritage, 2368 UNTS 3.

¹¹*Ibid.*, Arts. 1, 2.

¹²*Ibid.*, Arts. 11–15.

¹³*Ibid.*, Arts. 16–28.

¹⁴*Ibid.*, Arts. 16, 17, 21.

Mali made such a request to the Intergovernmental Committee and was granted funds of US \$307,307 to inventory intangible cultural heritage damaged by ‘conflict . . . and the occupation’.¹⁵ Yet, no statement was made by either the Committee or the state linking the ban on music with provisions of the Convention. A year later, in 2013, one of the traditions threatened by this ban, the ‘Imzad’ music of Tuareg women in Algeria, Niger, and northern Mali, was included in the Representative List of the Intangible Cultural Heritage of Humanity (Representative List) under the 2003 Convention. This was interpreted as a nod to the ban on music and restrictions on women’s life imposed by the extremists in northern Mali.¹⁶ However, neither the nomination file, decision on inclusion nor its description on the List drew a link with the conflict.¹⁷ Meanwhile, Mali’s vibrant music culture remains subdued¹⁸ and sociologists consider this loss of cultural identity to have loosened social cohesion.¹⁹ Compared with early acknowledgement of breaches of the World Heritage Convention and the 1954 Hague Convention, the question of whether there had been a violation of obligations under the Intangible Heritage Convention was left unanswered, leading to evident differences in the recognition and restoration of damage to Mali’s tangible and intangible cultural heritage.

This is the case even outside of the Malian context. Out of 677 elements of intangible cultural heritage corresponding to 140 states that are included in the Intangible Heritage Convention’s various lists, only seven elements corresponding to six states mention armed conflict as a challenge to their continuity.²⁰ This is despite the number of states implicated in ongoing conflicts far exceeding this.²¹ Of these, only five elements, including the recently fast-tracked inscription of Ukrainian borscht, make use of the Convention’s mechanisms for urgent safeguarding of threatened heritage. This silence goes both ways and the legal discourse surrounding armed conflict rarely acknowledges obligations under the 2003 Convention in discussions on cultural

¹⁵UNESCO, Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage: Meeting of the Bureau, UNESCO Doc. ITH/13/8.COM 3.BUR/4 (28 October 2013).

¹⁶S. von Schorlemer, ‘Military Intervention, the UN Security Council, and the Role of UNESCO: The Case of Mali’, in A.-M. Carstens and E. Varner (eds.), *Intersections in International Cultural Heritage Law* (2020), 100; H. Florusbosch, ‘Mali’s Heritage: Beyond Timbuktu’, *Leiden Anthropology Blog*, 4 June 2014, available at www.leidenanthropologyblog.nl/articles/malis-heritage-beyond-timbuktu.

¹⁷UNESCO Representative List, ‘Practices and Knowledge Linked to the Imzad of the Tuareg Communities of Algeria, Mali and Niger’, 2013, available at ich.unesco.org/en/RL/practices-and-knowledge-linked-to-the-imzad-of-the-tuareg-communities-of-algeria-mali-and-niger-00891.

¹⁸N. Spencer, ‘Ananya Cissé: Anoura Review – A Heartfelt Plea for Mali’, *Guardian*, 13 February 2021, available at <https://www.theguardian.com/music/2021/feb/13/anansa-cisse-anoura-review-mali>; ‘Implications of Conflict in the Malian Music Industry’, *Music in Africa*, 1 November 2018, available at <https://www.musicinafrica.net/magazine/implications-conflict-malian-music-industry>; R. Maclean, ‘Islamists Banned their Music. Now Timbuktu is Singing Again’, *Guardian*, 18 January 2018, available at www.theguardian.com/world/2018/jan/18/timbuktu-begins-to-sing-again-mali-music-jihadists.

¹⁹S. Fernandes, ‘The Day the Music Died in Mali’, *New York Times*, 19 May 2013, available at www.nytimes.com/2013/05/20/opinion/the-day-the-music-died-in-mali.html; S. Potter, ‘Music, Identity and National Cohesion in Mali: The Role of Music in the Post-Colonial Era’, (2019) 1(3) *Contemporary Voices: St Andrews Journal of International Relations* 51.

²⁰UNESCO, ‘Browse the Lists of Intangible Cultural Heritage’, available at ich.unesco.org/en/lists?text=&multinational=3#tabs; ‘Culture of Ukrainian Borscht Cooking: Ukraine’, available at ich.unesco.org/en/USL/culture-of-ukrainian-borscht-cooking-01852; ‘Shadow Play: Syrian Arab Republic’, available at ich.unesco.org/en/USL/shadow-play-01368; ‘Glasoechko, Male Two-Part Singing in Dolni Polog: North Macedonia’, available at ich.unesco.org/en/USL/glasoechko-male-two-part-singing-in-dolni-polog-01104; ‘Traditional Vallenato Music of the Greater Magdalena Region: Colombia’, available at ich.unesco.org/en/USL/traditional-vallenato-music-of-the-greater-magdalena-region-01095; ‘Ojkanje Singing: Croatia’, available at ich.unesco.org/en/USL/ojkanje-singing-00320; ‘Cultural Space of Palenque de San Basilio: Colombia’, available at ich.unesco.org/en/RL/cultural-space-of-palenque-de-san-basilio-00102; ‘Rabinal Achí Dance Drama Tradition: Guatemala’, available at ich.unesco.org/en/RL/rabinal-ach-dance-drama-tradition-00144.

²¹Estimates are of 110 ongoing armed conflicts involving 55 states. Geneva Academy, ‘Rule of Law in Armed Conflicts’, available at www.rulac.org/. The 2003 Convention has 180 states parties. See UNESCO, ‘Implementation of Standard-Setting Instruments’, 212 EX/23.LINF (16 August 2021), Annex II.

heritage. The UN Security Council increasingly sees the protection of cultural heritage as part of its peace and security mandate.²² However, Resolution 2347 of 2017, the first exclusively on cultural heritage, '[r]ecall[s] . . . the 2003 Convention' in its preamble but is silent on intangible heritage in its operative sections, only condemning and encouraging acts relating to tangible heritage.²³ UN and regional peacekeeping missions tasked with cultural heritage mandates,²⁴ as well as most national military manuals, fail to address intangible heritage or the near-universally ratified 2003 Convention.²⁵

A possible explanation for the reluctance to concretely link armed conflict with obligations under the 2003 Convention is the ambiguity surrounding the modalities of this relatively recent Convention's application in armed conflict. Unlike tangible heritage, which has long been protected under IHL, international law contained no direct protections for intangible heritage until this Convention came into force in 2006. There are indirect protections within IHL, including an array of civilian protections which apply equally to heritage-bearers, as well as provisions in both the Hague and Geneva systems stating that 'protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs'.²⁶ Relying on indirect IHL protections, international criminal law (ICL) has at times indirectly prosecuted acts targeting intangible cultural heritage. The post-war UN War Crimes Commission facilitated the prosecution of a regional Nazi leader, Arthur Geiser, under Article 46 of the Hague Regulations for, *inter alia*, the destruction of Polish intangible cultural heritage during occupation.²⁷ More recently, the ICC in *Al Mahdi* brought consequential damage to intangible cultural heritage within the scope of reparations for destruction of cultural property.²⁸ Such indirect prosecution is however contingent upon there being associated breaches of primary IHL rules. It is not apparent that these IHL rules cover all manifestations of intangible cultural

²²E.g., UNSC Resolution 1267, UN Doc. S/RES/1267 (15 October 1999); UNSC Resolution 1483, UN Doc. S/RES/1483 (22 May 2003), para. 7; UNSC Resolution 2199, UN Doc. S/RES/2199 (12 February 2015). See K. Hausler, 'The UN Security Council, the Human Rights Council, and the Protection of Cultural Heritage: A Matter of Peace and Security, Human Rights, or Both?', in Carstens and Varner, *supra* note 16, 202, at 215–18.

²³UNSC Resolution 2347, UN Doc. S/RES/2347 (24 March 2017). See K. Hausler, 'Cultural Heritage and the Security Council: Why Resolution 2347 Matters', (2018) 48 *QIL Zoom-In* 5, 14–15.

²⁴E.g., UNSC Resolution 2100, UN Doc. S/RES/2100 (25 April 2013), para. 16(f) (establishing MINUSMA); Council Decision (CFSP) 2017/1869 of 16 October 2017 on the European Union Advisory Mission in support of Security Sector Reform in Iraq, [2017] OJ L266/12, Art. 3(5).

²⁵E.g., UK Joint Doctrine and Concepts Centre, *The Joint Service Manual of the Law of Armed Conflict* (2004), available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf; USA Department of Defense, *Law of War Manual* (2015), available at dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190; Bundesministerium der Verteidigung, *Law of Armed Conflict Manual* (2013), available at www.bmvg.de/resource/blob/93610/ae27428ce99dfa6bbd8897c269e7d214/b-02-02-10-download-manual-law-of-armed-conflict-data.pdf; E. Wallach, 'Russian Leaders Know They're Committing War Crimes. Their Laws of War Manual Says So', *Lawfare*, 25 April 2022, available at www.lawfareblog.com/russian-leaders-know-theyre-committing-war-crimes-their-laws-war-manual-says-so (translated excerpts from Russian manual); New Zealand Defence Force, *Manual of Armed Forces Law* (2020), available at usnwc.libguides.com/ld.php?content_id=47364407. See K. Chainoglou, 'The Protection of Intangible Cultural Heritage in Armed Conflict: Dissolving the Boundaries Between the Existing Legal Regimes?', (2017) 2(3) *Santander Art and Culture Law Review* 109, 125.

²⁶1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land (Hague 1900), Annex, Art. 46; 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land (Hague 1907), Annex, Art. 46; 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (GC IV), 75 UNTS 287, Art. 27; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (AP I), 1125 UNTS 3, Art. 75(1); 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (AP II), 1125 UNTS 609, Art. 4(1).

²⁷*Trial of Gauleiter Artur Greiser*, Supreme National Tribunal of Poland (21 June–7 July 1946), Law Reports of Trials of War Criminals, vol. XIII (London: His Majesty's Stationery Office, 1949), 113–14. See J. Powderly, 'Prosecuting Heritage Destruction', in J. Cuno and T. G. Weiss (eds.), *Cultural Heritage and Mass Atrocities* (2022), 430, at 434.

²⁸See *Al Mahdi* case, *supra* note 7, paras. 15–22, 90.

heritage. Even the textually-porous ‘customs’ is described in the commentary to GC IV with reference to its ‘acceptance by the whole body of citizens’ and the ‘country’, excluding forms of heritage associated with subnational or minority groups.²⁹ Authors have noted how civilian protections pertaining to educational and cultural property³⁰ and civilian religious personnel³¹ may not extend to all intangible cultural elements of civilian life.³²

Equally, international human rights law (IHRL) contains protections for cultural life and education, including under the International Covenant on Economic, Social and Cultural Rights (ICESCR),³³ as well as minority protections and freedoms of religion and expression under the International Covenant on Civil and Political Rights (ICCPR),³⁴ which have been interpreted as encompassing intangible cultural heritage to some degree³⁵ and applying in conflict.³⁶ However, there remain concerns about the capacity of such protections, based within a framework that centres individual entitlements,³⁷ to fully capture the intergenerational, communitarian and processual character of intangible heritage or guarantee protection of its diverse manifestations.³⁸ Further, these heritage-integrated interpretations of human rights have, in most cases, followed in the wake of the 2003 Convention, through an integrated reading of IHRL with the Convention’s direct and specific protections.³⁹

Where tangible heritage is concerned, in addition to equivalent indirect protections for civilian property more generally, direct and specific protections for cultural property have existed in IHL since at least the late nineteenth century.⁴⁰ In the post-war era, there was a proliferation of UNESCO treaties focused on tangible cultural ‘heritage’,⁴¹ with the shift in terminology intended to better capture multidimensional and intergenerational aspects.⁴² Even then, the existence of intangible aspects to cultural heritage was overlooked. When considered, it was thought to be anchored to tangible heritage and protected through its protection.⁴³ This only changed when the understanding of heritage itself broadened in fields such as archaeology and anthropology,⁴⁴ coinciding with a push by newly-decolonized states for inclusion of their own visions of heritage, which did not always fit

²⁹International Committee of the Red Cross, GC IV, Commentary of 1958, Art. 27.

³⁰See AP I, *supra* note 26, Arts. 52–53; 85(4)(d); AP II, *supra* note 26, Art. 16.

³¹See AP I, *ibid.*, Art. 15(5); AP II, *ibid.*, Art. 9.

³²See Chainoglou, *supra* note 25, at 116–18; A. F. Vrdoljak, ‘Cultural Heritage in Human Rights and Humanitarian Law’, in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011), 262.

³³1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, Arts. 13(1), 14, 15(1)(a).

³⁴1966 International Covenant on Civil and Political Rights, 999 UNTS 171, Arts. 18, 19, 27. See also 1966 Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, Arts. 2, 5.

³⁵L. Lixinski, *Intangible Cultural Heritage in International Law* (2013), 146–70; see Chainoglou, *supra* note 25, at 121–2.

³⁶*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep. 226, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep. 136, paras. 106, 130. See G. Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (2014), 12–13.

³⁷E.g., CESCR, General Comment 21: Right of Everyone to Take Part in Cultural Life, UN Doc. E/C.12/GC/21 (21 December 2009), para. 9.

³⁸See Lixinski, *supra* note 35, at 147; see also UNESCO, Final Report: International Round Table on Intangible Cultural Heritage—Working Definitions (Turin, 14–17 March 2001), 8.

³⁹E.g., CESCR, *supra* note 37; UN Human Rights Council, Report of the Special Rapporteur on the Right to Education, Koumbou Boly Barry: Right to Education – The Cultural Dimensions of the Right to Education, or the Right to Education as a Cultural Right, UN Doc. A/HRC/47/32 (16 April 2021), para. 70.

⁴⁰E.g., Hague 1900, *supra* note 26, Art. 27; see Hague 1907, *supra* note 26, Arts. 27, 56. See Chainoglou, *supra* note 25, at 115.

⁴¹See 1954 Hague Convention, *supra* note 6; 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 823 UNTS 231; World Heritage Convention, *supra* note 4; 2001 Convention on the Protection of the Underwater Cultural Heritage, 2562 UNTS 1.

⁴²F. Francioni, ‘A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage’, in A. Yusuf (ed.), *Standard-Setting at UNESCO: Normative Action in Education, Science and Culture* (2007), vol. 1, 221, at 229.

⁴³E.g., UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention, UNESDOC WHC/2/ Revised (1996) (Operational Guidelines of the World Heritage Convention), para. 24 (protecting property ‘directly or tangibly associated with events, living traditions, beliefs’).

⁴⁴L. Smith, *Uses of Heritage* (2006), 54.

within existing tangible-centric protections.⁴⁵ This built momentum for an additional UNESCO treaty to directly protect such aspects of heritage, culminating in the Intangible Heritage Convention. Nevertheless, as a recent treaty and one not drafted specifically for armed conflict, there remain questions regarding how its obligations interact with the legal and factual matrix of conflict.

Armed conflict is a special category of crisis within international law. During disasters, for instance, it is presumed that international legal obligations continue, unless otherwise established. War, by contrast, was historically a rupture of relations with the suspension of all legal obligations between parties except the laws of war.⁴⁶ While this view has evolved in the last century, conflict is still the backdrop against which peacetime obligations are assessed, to examine if, and how they continue to bind. As the principal basis for international legal protection of intangible cultural heritage, the shape that obligations under the 2003 Convention take, has significant repercussions on the survival of such heritage, since the deterioration or destruction of intangible heritage during and after armed conflict is frequent and widespread.⁴⁷

This article offers answers to some of these questions. By considering the law on the effect of armed conflict on treaties in relation to the 2003 Convention, its continued albeit modified applicability in armed conflict is confirmed [Sections 2–3]. The article proceeds to consider the different ways in which these obligations are modified by the exigencies of conflict, with certain categories of obligations gaining greater specificity in anticipation of conflict but limited application during conflict (Articles 12–14), some retaining full applicability during conflict (Articles 17(3) and 22), and still others applying through integration with relevant rules in armed conflict, including cardinal IHL principles of distinction, proportionality and distinction, as well as cultural rights and minority protections under IHRL, to the extent of their applicability in conflict (Articles 1 and 11 on safeguarding, and Articles 16 and 17 on listing) [Sections 4.1 and 4.2.1]. The article considers how such an integrated approach could play out in different factual situations, using examples of listed intangible cultural heritage [Section 4.2.2], before drawing conclusions on the need for greater legal clarity in this regard.

2. Peacetime treaties in armed conflict

While scholarship has moved away from the position that peacetime treaties are inapplicable in conflict, there has been no authoritative statement on the law in this regard.⁴⁸ The 1969 Vienna Convention on the Law of Treaties (VCLT) skirts the issue, stating that it ‘shall not prejudice any question that may arise . . . from the outbreak of hostilities’.⁴⁹ The International Law Commission (ILC), in its commentaries to the draft articles of the VCLT, considered an ‘outbreak of hostilities between parties to a treaty to be wholly outside the scope of the general law of treaties’.⁵⁰

In 1985, the Institut de Droit International adopted an influential resolution stating that, ‘[t]he outbreak of an armed conflict does not ipso facto terminate or suspend the operation of treaties’ and that it ‘renders operative, in accordance with their own provisions, between the parties treaties . . . which by reason of their nature or purpose are to be regarded as operative during an armed conflict.’⁵¹ This resolution was expanded upon by the ILC in its Articles on the

⁴⁵See V. Tr Hafstein, *Making Intangible Heritage: El Condor Pasa and Other Stories from UNESCO* (2018), 62–3.

⁴⁶L. McNair, *The Law of Treaties* (1961), 698.

⁴⁷UNESCO, ‘Istanbul Declaration’, Third Round Table of Ministers of Culture (Istanbul, 16–17 September 2002).

⁴⁸S. Vöneky, ‘Armed Conflict, Effect on Treaties’, in *Max Planck Encyclopedia of Public International Law* (2011), para. 3.

⁴⁹1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 73.

⁵⁰ILC, Draft Articles on the Law of Treaties with Commentaries, 1966 YILC, Vol. II, Commentary to Draft Article 69, at 268.

⁵¹Institut de Droit International, *The Effects of Armed Conflicts on Treaties* (28 August 1985), Arts. 2 and 3.

Effect of Armed Conflicts on Treaties,⁵² which have been '[t]ake[n] note of, 'commend[ed]' and 'emphasize[d]' by the UNGA.⁵³ These Articles reiterate that treaties are not *ipso facto* terminated or suspended by armed conflict and Article 5 emphasizes that 'rules of international law on treaty interpretation' determine the impact of armed conflict on a treaty, while Article 6 identifies, 'criteria external to the treaty', that might also have a bearing on such a determination.⁵⁴ These include the nature of the treaty – its subject matter, object and purpose, content, number of parties – and the factual characteristics of the ongoing armed conflict – extent, scale, intensity, duration and, if non-international, outside involvement.⁵⁵ The Annex lists treaties whose subject matter implies continued operation during armed conflict as including '[m]ultilateral law-making treaties'.⁵⁶

At least some part of these Articles is reflective of custom. There is support for the proposition that armed conflict does not altogether suspend the application of 'peacetime multilateral treaties whose execution is compatible with the maintenance of war even without an explicit treaty provision'.⁵⁷ However, custom also indicates that the extent to which their provisions bind states is not necessarily the same as in peacetime⁵⁸ and obligations may be modified by inherent limitations or the situation of the state during conflict.⁵⁹ The same process identified by the ILC for determining applicability of a treaty in conflict – interpretation, with regard to the nature of the treaty and the factual circumstances of the conflict – also determines how obligations of performance are impacted.⁶⁰

Accordingly, an assessment of the manner in which the Intangible Heritage Convention applies during armed conflict must commence by applying '[t]he rules of international law on treaty interpretation', per ILC Article 5, before clarifying or confirming the results of such an examination by reference to external factors such as the nature of the treaty or the character of a particular conflict, per ILC Article 6.⁶¹

3. Interpreting the Intangible Heritage Convention in relation to armed conflict

'The rules of international law on treaty interpretation', codified in Articles 31-32 of the VCLT,⁶² require that the terms of a treaty be interpreted in accordance with their ordinary meaning, in context and in light of the object and purpose. Subsequent practice and other relevant rules of international law must be considered and reference may be made to preparatory work and the circumstances of conclusion of the treaty.

⁵²ILC, First Report on the Effects of Armed Conflicts on Treaties by Mr. I. Brownlie, Special Rapporteur, UN Doc. A/CN.4/552, 215 (21 April 2005).

⁵³UNGA Resolution 66/99, UN Doc. A/RES/66/99 (9 December 2011); UNGA Resolution 69/125, UN Doc. A/RES/69/125 (10 December 2014); UNGA Resolution 72/121, UN Doc. A/RES/72/121 (7 December 2017).

⁵⁴ILC, Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries, 2011 YILC, Vol. II (Part Two), Commentary to Draft Article 6, at 113.

⁵⁵*Ibid.*, Art. 6.

⁵⁶*Ibid.*, Annex.

⁵⁷See Vöneky, *supra* note 48, para. 7, citing *Goss v. Brocks*, Nebraska Supreme Court (1929) 223 NW 13; *Techt v. Hughes*, New York Court of Appeals (1920) 229 NY 222, cert denied (1920) 254 US 643; *Brownell v. San Francisco*, California Court of Appeals (1954) 26 Cal App 2d 102, 271 P 2d 974; L. Caflisch, 'The Effect of Armed Conflict on Treaties: A Stocktaking', in N. Boschiero et al. (eds.), *International Courts and the Development of International Law* (2013), 41, citing *Masinimport v. Scottish Mechanical Light Industries, Inc.* (1976).

⁵⁸See analysis of state practice in C. Chinkin, 'Crisis and the Performance of International Agreements: The Outbreak of War in Perspective', (1981) 7 *Yale Journal of World Public Order* 177, 194–205.

⁵⁹See Vöneky, *supra* note 48, para. 15.

⁶⁰See Chinkin, *supra* note 58, 205.

⁶¹ILC Commentary to Draft Article 5, 2011 YILC, Vol. II (Part Two), 112.

⁶²*Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment of 12 November 1991, [1991] ICJ Rep. 53, para. 48.

3.1 Ordinary meaning of terms

While no provision of the 2003 Convention addresses its application in armed conflict, neither does any provision permit limitations or derogations during armed conflict, unlike in certain human rights treaties.⁶³ Reference is made generally to crises which could threaten intangible cultural heritage in Parts IV and V of the treaty, on safeguarding at the international level. In Part IV, concerning international lists of intangible cultural heritage, Article 17 provides for a List of Intangible Cultural Heritage in Urgent Need of Safeguarding (Urgent Safeguarding List) and, in paragraph 3, notes:

In cases of extreme urgency – the objective criteria of which shall be approved by the General Assembly upon the proposal of the Committee – the Committee may inscribe an item of the heritage concerned on the List mentioned in paragraph 1, in consultation with the State Party concerned.

In Part V, on international assistance to states parties, Article 22, paragraph 2, states that '[i]n emergencies, requests for assistance shall be examined by the Committee as a matter of priority'. The context clarifies the meaning of these provisions.

3.2 Context

Among the functions of the Intergovernmental Committee is that of 'prepar[ing] and submit[ting] to the General Assembly for approval operational directives for the implementation of this Convention'.⁶⁴ These 'Operational Directives' are adopted by the General Assembly of states parties and form part of the context of the 2003 Convention, as defined under Article 31, paragraph 2(b) of the VCLT.⁶⁵ These Directives 'indicate the procedures to be followed for inscribing intangible heritage on the lists of the Convention, the provision of international financial assistance' and other specifics for implementation of the Convention.⁶⁶ The reference in Article 22, paragraph 2, to 'emergencies' justifying priority international assistance, is elaborated upon by the Directives:

[A]n emergency shall be considered to exist when a State Party finds itself unable to overcome on its own any circumstance due to calamity, natural disaster, armed conflict, serious epidemic or any other natural or human event that has severe consequences for the intangible cultural heritage.⁶⁷

In the case of Article 17, paragraph 3, although the Directives do not define an 'extreme urgency' allowing for expedited inscription on the Urgent Safeguarding List, commentators consider that 'one may assume, by analogy, that the situations indicated by the [Operational Directives] as justifying an emergency request for international assistance ... may justify application of Article 17(3)'.⁶⁸ The recently expedited inscription of Ukrainian borscht cooking specifically

⁶³See 1966 International Covenant on Civil and Political Rights, *supra* note 34, Art. 4; 1966 International Covenant on Economic, Social and Cultural Rights, *supra* note 33, Art. 8.

⁶⁴See Intangible Heritage Convention, *supra* note 10, Art. 7(e).

⁶⁵'[A]ny instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.'

⁶⁶UNESCO, 'Operational Directives for the implementation of the Convention for the Safeguarding of the Intangible Heritage', available at ich.unesco.org/en/directives.

⁶⁷UNESCO, 'Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage', (6th Session Paris, 30 May–1 June 2016) (Operational Directives), para. 50.

⁶⁸F. Lenzerini, 'Arts. 16–17: Listing Intangible Cultural Heritage', in J. Blake and L. Lixinski (eds.), *The 2003 Intangible Cultural Heritage Convention: A Commentary* (2020), 321.

notes that ‘armed conflict has threatened the viability of the element’, confirming such an interpretation.⁶⁹

3.3 Object and purpose

Although the Preamble does not refer to armed conflict, it notes that ‘existing international agreements, recommendations and resolutions concerning the cultural and natural heritage need to be effectively enriched and supplemented by means of new provisions relating to the intangible cultural heritage’, implying a gap-filling intention. IHL’s silence on intangible cultural heritage, despite armed conflict being one of the primary threats to its viability,⁷⁰ is a particularly apparent gap and the preambular objective of a more integrated approach to international cultural heritage law must be inferred as extending to this domain.

3.4 Subsequent practice

Article 31, paragraph 3(b) of the VCLT requires consideration of ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’. The Intergovernmental Committee – created by election from the General Assembly of States parties⁷¹ – is tasked with ‘establish[ing], keep[ing] up to date and publish[ing]’ the Urgent Safeguarding List under Article 17 of the Convention. The criteria for such ‘establishment, updating and publication’ is pre-approved by the General Assembly,⁷² directly reflecting ‘the agreement of the parties’ regarding interpretation of Article 17. The selection process, delegated by the General Assembly to the subset of parties forming the Committee, indirectly reflects the same.

This List includes several examples of heritage in urgent need of safeguarding from armed conflict, including Ukrainian borscht. ‘[T]he armed conflict in Colombia’, for instance, is described as the most notable threat to traditional Vallenato music.⁷³ The decision to include Syrian shadow play on the List, considers ‘the mass displacement of Syrian people both inside and outside the country as a result of armed conflicts in Syria’ to be the major reason for its decline.⁷⁴ Similarly, the ‘migration of its bearers following the civil war conflict’, is why traditional singing in the former Yugoslavia remains under threat.⁷⁵

The Intergovernmental Committee is also tasked with ‘examining requests for international assistance’ under Article 22. In exercise of this delegated authority to interpret Article 22, ‘the first emergency international assistance provided through the Intangible Cultural Heritage Fund’⁷⁶ was in response to Mali’s request for funds to inventory intangible cultural heritage damaged by ‘conflict . . . and the occupation . . . by armed groups and extremists’.⁷⁷ The requested assistance

⁶⁹UNESCO Intangible Cultural Heritage, Decision of the Intergovernmental Committee, 5.EXT.COM.5 (1 July 2022).

⁷⁰UNESCO, Decision of the Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage: 14.COM 13 (2019).

⁷¹See Intangible Heritage Convention, *supra* note 10, Art. 5.

⁷²*Ibid.*, Art. 17.

⁷³UNESCO Urgent Safeguarding List, ‘Traditional Vallenato Music of the Greater Magdalena Region: Colombia’, 2015, available at ich.unesco.org/en/USL/traditional-vallenato-music-of-the-greater-magdalena-region-01095.

⁷⁴UNESCO, Decision of the Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage: 13.COM 10.A.7 (2018).

⁷⁵UNESCO, ‘Glasoechko, Male Two-Part Singing in Dolni Polog: North Macedonia’, 2015, available at ich.unesco.org/en/USL/glasoechko-male-two-part-singing-in-dolni-polog-01104; UNESCO, ‘Ojkanje Singing: Croatia’, 2010, available at ich.unesco.org/en/USL/ojkanje-singing-00320.

⁷⁶UNESCO, Decision of the Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage: 10.COM 6.c (2015).

⁷⁷UNESCO, Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage: Meeting of the Bureau, UNESCO Doc. ITH/13/8.COM 3.BUR/4 (28 October 2013).

and funds of US\$307,307 were granted and were described by the Committee as having contributed to ‘reconstruction and social cohesion’, despite the ongoing conflict.⁷⁸

3.5 Other relevant rules of international law

Under Article 31, paragraph (3)(c), of the VCLT, states must interpret a treaty in light of ‘any relevant rules of international law applicable in the relations between the parties’. This interpretive rule has gained prominence with ‘the proliferation of particular treaty regimes’ in international law.⁷⁹ As recognized by the ILC and indeed by the 2003 Convention’s Preamble, there is a growing need to ensure treaties are interpreted in the context of other agreements, custom and general principles of international law, to prevent the progressive fragmentation of international law.⁸⁰ Such ‘systemic integration’ is especially necessary with multilateral law-making treaties,⁸¹ whose ‘object is not to strike a balance between the rights and advantages which the States parties mutually grant to one another, but to establish common international rules, reflecting shared values, that all parties undertake to observe’.⁸² The 2003 Convention falls within this category. As a relatively recent treaty, it is necessary to consider the highly-specialized legal context in which it came into force, including the laws governing armed conflict.

3.5.1 Self-contained regimes

IHL forms one among a number of ‘self-contained regimes’ within international law, a concept explored by the ILC in its Fragmentation Report.⁸³ These regimes lie on a spectrum and there is ambiguity regarding whether they ‘designate[] a special branch of international law within which apply other interpretative principles than apply generally, or merely an aggregate of treaty and customary rules dealing with [a subject]’.⁸⁴ The ILC’s Articles on the Effect of Armed Conflicts on Treaties demonstrate that IHL fits better in the latter category, since it does not automatically exclude application of other laws. It appears that the only general interpretive rule implied in the designation of a regime as self-contained is that it acts as a ‘strong [form] of *lex specialis*’,⁸⁵ taking priority of application in situations concerning its subject matter.⁸⁶

Within this broad understanding of self-contained regimes, international cultural heritage law too may be labelled as such. It certainly falls within the ILC’s understanding of a functionally-oriented ‘aggregate of treaty and customary rules’ on a specified subject, ‘serv[ing] to identify and articulate interests that serve to direct the administration of the relevant rules’.⁸⁷ It is structured around the UNESCO cultural treaties and broadly administered by UNESCO with a common ethos and policy objective.⁸⁸ Its principles – safeguarding cultural heritage for all humanity and

⁷⁸UNESCO, Decision of the Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage: 10.COM 6.c (2015); A. F. Vrdoljak, ‘Arts. 20-24: International Assistance’, in Blake and Lixinski, *supra* note 68, at 371.

⁷⁹C. McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention’, (2005) 54 ICLQ 279.

⁸⁰ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, Finalized by M. Koskeniemi, UN Doc. A/CN.4/L.682 (2006) (Fragmentation Report), paras. 8–15.

⁸¹*Ibid.*, paras. 462, 470.

⁸²ILC, Second Report on Reservations to Treaties, by Mr. Alain Pellet, Special Rapporteur, UN Doc. A/CN.4/477 (1996), para. 84.

⁸³See Fragmentation Report, *supra* note 80, paras. 129, 136.

⁸⁴*Ibid.*, para. 133.

⁸⁵*Ibid.*, paras. 123, 151; see ILC, Commentary to Draft Article 55 on Responsibility of States for Internationally Wrongful Acts, 2001 YILC, Vol. II (Part Two), 140, para. 5.

⁸⁶See Fragmentation Report, *supra* note 80, paras. 148, 152; B. Simma, ‘Self-Contained Regimes’, (1985) 16 *Netherlands Yearbook of International Law* 111, 115–16.

⁸⁷See Fragmentation Report, *ibid.*, para. 133.

⁸⁸*Ibid.*, para. 129; UNGA, Fragmentation of International Law: Difficulties Arising from The Diversification And Expansion Of International Law, UN Doc. A/CN.4/L.702, 11 (18 July 2006), conclusion (11); M. Lostal, *International Cultural Heritage Law in Armed Conflict* (2017), 62–3.

promoting cultural diversity – articulate common interests and direct the administration of its rules.⁸⁹ Straddling these self-contained regimes is the 1954 Hague Convention, which protects cultural property in armed conflict.

The 2003 Convention is one of UNESCO's cultural heritage treaties. Its structural logic and institutional arrangements are closer to the World Heritage Convention than the 1954 Hague Convention, the only UNESCO treaty incontrovertibly integrated with rules governing conduct of hostilities. This analogy may not, at first glance, support the argument for integrating the 2003 Convention's obligations with IHL. However, the case has been made for integrating the World Heritage Convention itself with rules on distinction, proportionality, and precaution under IHL.⁹⁰ In any event, the World Heritage Convention was drafted after the 1954 Hague Convention and was intended to expand cultural protections, which until then had only existed in IHL, into peacetime for significant tangible heritage.⁹¹ Irrespective of the World Heritage Convention's integration with IHL, all properties under it are also protected as 'cultural property' under IHL, including under the 1954 Hague Convention.⁹² Meanwhile the 2003 Convention was drafted as the only direct legal protection for intangible cultural heritage, in peacetime or conflict. Its position in this system of specialized treaties is unique and not strictly analogous to either the World Heritage Convention, which falls squarely within the regime of international cultural heritage law, or the 1954 Hague Convention, which occupies an intersection between regimes.

3.5.2 Systemic integration

In determining the manner in which the 2003 Convention applies in armed conflict, it is necessary to consider how the regime it forms part of, international cultural heritage law, interacts generally with IHL. Since designating a regime as self-contained indicates a strong form of *lex specialis*, instead of the specificity of individual rules, the specificity of the regime as a whole is examined to determine whether its rules take priority over another regime or general international law. Where intangible cultural heritage is threatened by conflict, the regime with greater specificity is not self-evident.⁹³ If subject matter is the fulcrum,⁹⁴ either conflict or cultural heritage could be viewed as the primary subject, with the other forming its backdrop. The interplay of such issue-based, protective regimes with armed conflict was considered by the International Court of Justice in its Advisory Opinion on *Legality of Nuclear Weapons*. While prioritizing IHL in assessing arbitrary deprivation of life in armed conflict, the Court noted that the application of the self-contained regimes of international human rights law and international environmental law did not 'cease in times of war'.⁹⁵ It rejected the argument that these were peacetime regimes, stating that, 'the issue is not whether [such treaties] are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict'.⁹⁶ This reasoning extends to the 2003 Convention. Since the presumption under the customary international law on treaty interpretation is that relevant rules will be harmonized and integrated,⁹⁷ it is only where co-application is impossible that the question of determining a hierarchy arises.

⁸⁹See World Heritage Convention, *supra* note 4, Preamble, recitals 2, 5, 6; 1954 Hague Convention, *supra* note 6, Preamble, recitals 2, 3; Intangible Heritage Convention, *supra* note 10, Preamble, recitals 5, 6.

⁹⁰See Lostal, *supra* note 88, at 81.

⁹¹C. Forrest, *International Law and Cultural Heritage* (2010), 389.

⁹²See 1954 Hague Convention, *supra* note 6, Art. 1(a).

⁹³See Fragmentation Report, *supra* note 80, para. 55.

⁹⁴*Ibid.*, para. 112.

⁹⁵See *Nuclear Weapons*, *supra* note 36, para. 25.

⁹⁶*Ibid.*, para. 30.

⁹⁷See Fragmentation Report, *supra* note 80, paras. 37–38. See J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), 240–4.

In any event, even if IHL is considered the special law, general international law retains its gap-filling function where a special regime is silent or fails in its protective function.⁹⁸ The silence of IHL on intangible cultural heritage is indicative of a gap as, at the time of drafting the 1954 Hague Convention and its expanded 1999 Second Protocol,⁹⁹ explicit protections for intangible cultural heritage were not yet cemented in international law. While general international law has progressed, culminating in the 2003 Convention, IHL has not kept pace. This silence has the potential to result in significant cultural losses for civilians and could be seen as IHL failing in its protective function, justifying integration of its rules with the 2003 Convention.

3.6 *Travaux préparatoires*

Reliance upon the 2003 Convention's preparatory work clarifies one aspect of its application in armed conflict. The initial draft of Article 17 on the Urgent Safeguarding List, contained a non-exhaustive list of situations justifying inscription, including 'outbreak or the threat of an armed conflict'.¹⁰⁰ This list was removed from the final draft, but only so as not to exclude other threats, since 'the grounds threatening the integrity of ICH are potentially innumerable'.¹⁰¹ The preparatory work does not provide similar clarity on other provisions.

3.7 *Circumstances of conclusion*

The 2003 Convention was adopted in the same session of the UNESCO General Conference as the Declaration concerning the Intentional Destruction of Cultural Heritage (Intentional Destruction Declaration), which was a reaction to the Taliban's destruction of the Bamiyan Buddhas and followed the extensive cultural destruction of the Balkan wars.¹⁰² The 2003 Convention's preambular reference to 'the phenomenon of intolerance [leading] to grave threats of deterioration, disappearance and destruction of the intangible cultural heritage' takes on particular meaning in this light.

Another relevant document preceding the 2003 Convention was the 2002 Istanbul Declaration adopted at a UNESCO Round Table of Ministers of Culture. The Declaration notes that the '[t]he extreme vulnerability of the intangible cultural heritage, which is threatened by disappearance or marginalisation, as a result inter alia of conflicts ... requires that governments take resolute action' and that 'an appropriate international Convention ... should be developed'.¹⁰³ Safeguarding cultural heritage from deliberate and non-deliberate destruction in conflict was evidently high on UNESCO's agenda at the time of adopting the 2003 Convention.

Interpreting the 2003 Convention according to the rules of treaty interpretation reveals that it is positioned to be closely interlinked with armed conflict, with at least some of its provisions specifically catered to conflict. It does not, however, reveal the manner in which general obligations of safeguarding are to be carried out in or modified for conflict. A consideration of 'external' factors, including the nature of the treaty and circumstances of the conflict, is necessary to shed light on this.¹⁰⁴

⁹⁸See Fragmentation Report, *ibid.*, para. 194.

⁹⁹1999 Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 2253 UNTS 172 (Second Protocol), Art. 22.

¹⁰⁰'Draft Article 10', reproduced in Lenzerini, *supra* note 68, at fn. 27.

¹⁰¹*ibid.*, at 321.

¹⁰²UNESCO, Declaration concerning the Intentional Destruction of Cultural Heritage (17 October 2003); UNESCO, Records of the General Conference (32nd Session Paris, 29 September–17 October 2003), vol. 1: Resolutions, 53 and 62; A. F. Vrdoljak, 'The Criminalisation of the Intentional Destruction of Cultural Heritage', in T. Bergin and E. Orlando (eds.), *Forging a Socio-Legal Approach to Environmental Harm* (2017), 20.

¹⁰³See UNESCO, 'Istanbul Declaration', *supra* note 47.

¹⁰⁴See Vöneky, *supra* note 48, para. 15; ILC Draft Articles, *supra* note 54, Art. 6.

4. An integrated view of obligations under the Intangible Heritage Convention in Armed Conflict

In assessing how armed conflict conditions treaty obligations, ILC Article 6 refers to ‘the nature of the treaty’, meaning ‘in particular its subject-matter, its object and purpose, its content and the number of parties to the treaty’. As a multilateral treaty with 180 parties, the 2003 Convention declares itself one of UNESCO’s ‘normative instruments for the protection of the cultural heritage’, founded on ‘the universal will and the common concern to safeguard the intangible cultural heritage of humanity’.¹⁰⁵ The subject-matter, object, and purpose as indicated by the Preamble, as well as the number of parties point towards its obligations being intended to have widespread and universal applicability. The text indicates it was drafted with a variety of threats in mind, including crises such as armed conflict.¹⁰⁶ It would be impracticable, in such varied contexts, for the Convention’s obligations to envisage absolute elimination of threat or harm to intangible cultural heritage during crisis. They appear, instead, to be directed towards minimization of risk.

The obligation of safeguarding intangible cultural heritage, in Article 11, requires a state to ‘ensure the safeguarding of the intangible cultural heritage present in its territory’. Article 2, paragraph 3, defines ‘safeguarding’ as ‘measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage’. The emphasis is on the process, rather than any definite outcome. However, the Convention contains two distinct types of obligation – the broad and unqualified obligation of safeguarding under Article 11 that binds parties at all times and in all situations; and the specific steps for safeguarding, laid out in Part III. Insofar as armed conflict is concerned, a clear distinction can be drawn between this second category which is of greater relevance in anticipation of conflict, and the first, which retains relevance during conflict itself.

4.1 Obligations in anticipation of conflict

While considerable discretion is vested in states in fulfilling their Article 11 obligation to safeguard, Part III lists specific measures to be implemented at the national level. Article 12 requires the drawing up of inventories. Article 13 requires adoption of policies for ‘integrating the safeguarding of such heritage into planning programmes’, designating bodies for overseeing safeguarding, fostering studies of ‘intangible cultural heritage in danger’, and other institutional measures. Article 14 lays out obligations of education and capacity-building, including to ‘keep the public informed of the dangers threatening such heritage’.

In the context of armed conflict, these measures take on a similar character to obligations under Article 3 of the 1954 Hague Convention which requires parties ‘to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict’. The measures under Part III too may be of greater utility if undertaken in times of peace to forestall harm during armed conflict. Being contingent upon positive state action, these obligations of performance may be confronted by constraints on institutional capacity during conflicts of greater intensity.¹⁰⁷ In its 2014 periodic implementation report, for instance, Colombia noted that ‘forced displacement derived from the armed conflict has been a strong cause for social fabric rupture’, impacting performance of its obligation of education and

¹⁰⁵See Intangible Heritage Convention, *supra* note 10, Preamble, recitals 5 and 7.

¹⁰⁶See Section 3, *supra*.

¹⁰⁷See Section 4.2, *infra*.

awareness raising under Article 14.¹⁰⁸ No issue was raised by the Intergovernmental Committee, in reviewing this report.¹⁰⁹ In any event, the long-term, pre-emptive outlook of these obligations makes it unlikely they could avert immediate threats, even if performance continued during conflict. The bulk of labour will lie during peacetime or in the period leading up to armed conflict and outbreak of armed conflict may justify limited performance.

4.2 Obligations during conflict

During armed conflict, certain provisions have direct and unmodified applicability. These include Article 17, paragraph 3 allowing emergency listing on the Urgent Safeguarding List and Article 22, allowing emergency requests for international assistance. These provisions are, after all, intended for crises and invoked at the option of the affected state.

The obligations of safeguarding intangible cultural heritage, listed as the first purpose of the Convention in Article 1 and the obligation in relation to heritage on a state's own territory in Article 11 also have continued relevance. However, unlike the 1954 Hague Convention, which integrates its obligations of protection of cultural property with IHL, the 2003 Convention provides no guidance on how its safeguarding obligations will apply during conflict. The Operational Directives only observe that states must adopt 'measures to . . . reduce their vulnerability during . . . conflicts'.¹¹⁰ Even the 'operational principles and modalities for safeguarding intangible cultural heritage in emergencies', developed by the Intergovernmental Committee in consultation with experts, provide more guidance on preparedness than on obligations during conduct of hostilities, with the exception of the stipulation that parties '[s]hare information within and between affected States Parties . . . and/or armed forces, to determine the nature and extent of the disruption to intangible cultural heritage and the scope for engaging it in mitigation'.¹¹¹

The lack of guidance regarding ongoing armed conflict is natural in a treaty with a wide ambit and does not exclude its extension to the battlefield. Article 31, paragraph 3(c) of the VCLT necessitates the systemic integration of obligations under this near-universally ratified Convention with core IHL obligations, especially those forming custom. A similar interpretation has been urged in relation to other cultural treaties of general scope. Although the World Heritage Convention makes no mention of armed conflict, its provisions have been considered as applying, *mutatis mutandis*, in conflict.¹¹² The argument in support is that the treaty concerns protection of world heritage against threats and armed conflict is among the most serious threats;¹¹³ there already exist IHL obligations towards cultural heritage and since world heritage is specially protected, this must imply heightened IHL protections.¹¹⁴

At first glance, this argument cannot be directly imported to the 2003 Convention since intangible heritage is not in a hierarchy in relation to other forms of heritage, unlike world heritage. Further, IHL obligations pertain directly only to tangible heritage and it may be argued that they cannot, as easily, be extended to intangible forms. However, equating intangible heritage

¹⁰⁸UNESCO, Report on the Implementation of the Convention and on the Status of Elements Inscribed on the Representative List of the Intangible Cultural Heritage of Humanity: Colombia (15 December 2014), 12.

¹⁰⁹UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Examination of the Reports of States Parties on the Implementation of the Convention and on the Current Status of Elements Inscribed on the Representative List of the Intangible Cultural Heritage of Humanity, ITH/15/10.COM/6.a (Windhoek, 20 November–4 December 2015), 22.

¹¹⁰See Operational Directives, *supra* note 67, para. 195(b)(iii).

¹¹¹UNESCO Intangible Cultural Heritage, Operational Principles and Modalities for Safeguarding Intangible Cultural Heritage in Emergencies, 8.GA 9 (9 September 2020).

¹¹²See Lostal, *supra* note 88, at 81.

¹¹³*Ibid.*

¹¹⁴*Ibid.*, at 116–17.

with world heritage is inapposite. Whereas world heritage is a special category of protection within the law on tangible heritage, intangible heritage is best understood as a parallel set of laws, since it does not share protections under treaties or custom with tangible heritage. Within the sphere of legal protections for intangible heritage, there does exist an internal hierarchy of sorts. The 2003 Convention contains two lists, the Representative List and Urgent Safeguarding List, and elements on these lists should be viewed as roughly equivalent to world heritage.

Admittedly, the 2003 Convention does not delineate special obligations in relation to these lists. The World Heritage Convention only obligates states to protect heritage of ‘outstanding universal value’ and permits requests for international assistance in relation to heritage included or suitable for inclusion on the World Heritage List. The 2003 Convention in Article 11 requires states to safeguard all intangible heritage in their territory and allows requests for international assistance in respect of any intangible heritage, not merely listed heritage. Nevertheless, it is necessary to draw a distinction between listed and unlisted intangible heritage in envisaging the application of the 2003 Convention in conflict. If expansive national inventories are relied on, parties may find themselves unable to account for the safeguarding needs of hundreds of elements of intangible heritage in the territory of the conflict.¹¹⁵ These international lists provide a streamlined categorization that is helpful in contemplating obligations in armed conflict.¹¹⁶

4.2.1 *Positing the special status of listed intangible heritage*

In the run up to the 2003 Convention, UNESCO created several iterations of a list of ‘Masterpieces of the Oral and Intangible Heritage of Humanity’ (Masterpieces) that was a close analogy to the World Heritage List.¹¹⁷ At the time of drafting the 2003 Convention, discussion centred around incorporating these Masterpieces into the treaty and continuing their selection under its provisions, much like the World Heritage List.¹¹⁸ However, concerns regarding the elitism and exclusion inherent in ranking – criticisms that have dogged the World Heritage List¹¹⁹ – led to a more egalitarian list, the Representative List, whose criteria is not that the heritage be a ‘masterpiece of human creative genius’ or ‘outstanding’, as under the World Heritage List,¹²⁰ but merely that the element ‘[constitute] intangible cultural heritage’ and that,

[i]nscription of the element will contribute to ensuring visibility and awareness of the significance of the intangible cultural heritage and to encouraging dialogue, thus reflecting cultural diversity worldwide and testifying to human creativity.¹²¹

Nevertheless, the listing procedure ‘was manifestly and deliberately inspired by the structure of the [World Heritage] Convention’, from nominations by states parties which are evaluated by experts and voted upon by the intergovernmental committee¹²² to consequences of increased visibility,

¹¹⁵E.g., UNESCO, Rapport sur la mise en œuvre de la convention et sur l’état des éléments qui ont été inscrits sur la liste représentative du patrimoine culturel immatériel de l’humanité: Mali (15 December 2017), 8 (61 elements of intangible cultural heritage affected by conflict in the north of the country and 150 in the south).

¹¹⁶See Chainoglou, *supra* note 25, at 118; Vrdoljak, *supra* note 32, at 265.

¹¹⁷UNESCO, Masterpieces of the Oral and Intangible Heritage of Humanity: Proclamations 2001, 2003 and 2005, CLT/CH/ITH/PROC/BR3 (2006).

¹¹⁸V. Tr Hafstein, ‘Intangible Heritage as a List: From Masterpieces to Representation’, in L. Smith and N. Akagawa (eds.), *Intangible Heritage* (2009), 98.

¹¹⁹A. A. Yusuf, ‘Article 1 – Definition of Cultural Heritage’, in F. Francioni (ed.), *The 1972 World Heritage Convention: A Commentary* (2008), 29.

¹²⁰See Hafstein, *supra* note 118, at 107; Operational Guidelines of the World Heritage Convention, *supra* note 43, para. 77.

¹²¹See Operational Directives, *supra* note 67, para. I.2.

¹²²See Intangible Heritage Convention, *supra* note 10, Art. 16; Lenzerini, *supra* note 68, at 323; Operational Guidelines of the World Heritage Convention, *supra* note 43, paras. 143–153.

economic support and public awareness.¹²³ The difference is only in the symbolic rejection of ranking. While the Representative List does not consider listed forms of heritage as having greater cultural merit, it does consider them emblematic of the value placed by associated communities and all humankind in intangible cultural heritage. The curated List, which factors in geographical equity,¹²⁴ ongoing safeguarding and community participation, as well as the likelihood that the heritage can raise the general profile of intangible cultural heritage,¹²⁵ serves to champion diversity of cultural expression. A similar argument as that for heightened IHL protections for world heritage can be made for protection of items on the Representative List, since their loss is of concern not only to associated communities but all humankind.

The Urgent Safeguarding List meanwhile functions differently from the List of World Heritage in Danger under the World Heritage Convention. While the latter is composed of properties on the World Heritage List which are ‘threatened by serious and specific dangers’,¹²⁶ including conflict, the Urgent Safeguarding List does not comprise heritage on the Representative List.¹²⁷ It is an independent list of any form of intangible heritage whose ‘viability is at risk’ or ‘is facing grave threats as a result of which it cannot be expected to survive without immediate safeguarding’,¹²⁸ as determined by the territorial state and confirmed by the Intergovernmental Committee.¹²⁹ It carries even less connotation of ranking than the Representative List since it is the circumstances, rather than anything inherent to the heritage, that justifies its listing. While the rationale for special protection of items on the Representative List is that they are emotive and inclusive symbols of cultural diversity, the rationale for special protection of heritage on the Urgent Safeguarding List is the mere fact that it is already in grave danger. Given state support for the stance that all intangible heritage is of equal value and contributes to global cultural diversity,¹³⁰ irreversible loss of any form of heritage is a loss of diversity to the detriment of all humankind. A form of heritage precarious enough to be listed merits special protection to keep it from disappearing.

Additionally and despite the intention of its drafters, elements on these lists have been noted as having greater visibility in the eyes of governments and the public, often being better protected and perceived as more important.¹³¹ While acknowledging the danger that listing would lead to this hierarchy, the drafters considered it in the ultimate interests of the Convention’s workability for some elements to be accorded special attention at the international level.¹³² It was thought that this would raise the profile of the Convention and ally it with the established World Heritage List, besides making protections concrete in relation to listed elements. It was even considered that such international lists would have a trickle-down effect and encourage comprehensive national listings.¹³³ The feasibility of protecting intangible cultural heritage in armed conflict too hinges on finite and identifiable categorizations rather than being egalitarian to the point of impracticability. The same logic justifying inclusion of lists in the 2003 Convention’s framework also justifies their special status during armed conflict.

This is not to say that heritage not on either list is entirely unprotected in armed conflict. Since the bulk of labour under the 2003 Convention is carried out in anticipation of crisis, proper fulfilment of obligations of inventorying, policy-making, planning, and institutional measures,

¹²³See Lenzerini, *supra* note 68, at 326.

¹²⁴*Ibid.*, at 323–4.

¹²⁵See Operational Directives, *supra* note 67, para. I.2.

¹²⁶See World Heritage Convention, *supra* note 4, Art. 11(4).

¹²⁷See Operational Directives, *supra* note 67, para. I.11.38.

¹²⁸*Ibid.*, para. I.1.1.U.2.

¹²⁹See Intangible Heritage Convention, *supra* note 10, Art. 17.

¹³⁰See Hafstein, *supra* note 118, at 107–8.

¹³¹See Lenzerini, *supra* note 68, at 308.

¹³²*Ibid.*

¹³³*Ibid.*

alongside education and awareness-raising, will preserve knowledge and foster community vigilance to protect most forms of heritage from irreversible damage during conflict. The resilience of intangible heritage, under the right circumstances, can be remarkable and greater than tangible heritage. The Register of Good Safeguarding Practices under Article 18 of the 2003 Convention includes the Epirus polyphonic song, a centuries-old Greek group singing technique.¹³⁴ Although gravely impacted by the Second World War and the Greek Civil War with only a handful of performers remaining, it was revived over half a century later in the 1990s by young performers and now serves as an example of best practice to revitalize threatened heritage. Proper implementation of anticipatory measures under the 2003 Convention will ensure that survival is not left to chance or the initiative of a tenacious local community, but is part of a country's institutional framework. The same optimism cannot be extended to heritage on the Urgent Safeguarding List, since heritage already in danger of disappearance is less likely to survive without special measures during armed conflict. In the case of the Representative List, its place as first among equals makes it worthwhile to pre-empt potential threats by according protection to heritage emblematic of human cultural diversity, which raises the profile of the field as a whole. The obligation of safeguarding heritage during armed conflict should thus be interpreted as primarily directed at listed heritage. The form this obligation will take is linked with a state party's other obligations in conflict.

4.2.2 IHL protections for listed intangible heritage

IHL's status as *lex specialis* in armed conflict does not preclude its systemic integration with other relevant obligations, with the emphasis being on harmonization and gap-filling.¹³⁵ Article 1 and 11 of the 2003 Convention are broadly worded and capable of sustaining harmonious co-application. As discussed, IHL contains general civilian protections and protections for 'religious convictions and practices . . . manners and customs' that may have some relevance to intangible cultural heritage.¹³⁶ On their own, these provisions cannot shoulder the protection of all forms of intangible heritage. Civilian protections, unlike special protections for cultural property, are subject to the exigencies of military necessity to a greater degree. Civilian property may be converted to military use and there is no absolute prohibition on harm to civilian persons and property, subject to meeting proportionality assessments.¹³⁷ These indirect protections can, however, be integrated with 2003 Convention obligations to ensure better safeguarding of intangible heritage.¹³⁸

Soft law is already moving in the direction of holistic protection. The Preamble to the Intentional Destruction Declaration refers to 'principles concerning the protection of cultural heritage in the event of armed conflict' under IHL and the 1954 Hague Convention, but also '[r]ecall[s] the principles of all UNESCO's conventions . . . for the protection of cultural heritage' and '[r]eaffirm[s] that issues not fully covered by the present Declaration and other international instruments concerning cultural heritage will continue to be governed by the principles of international law'. In its Article III on '[m]easures to combat intentional destruction of cultural heritage', it recommends 'a higher standard of protection of cultural heritage' and 'coordinated application of existing and future instruments'. In Article V on the '[p]rotection of cultural heritage in the event of armed conflict', it urges that:

¹³⁴UNESCO Register of Good Safeguarding Practices, 'Polyphonic Caravan, Researching, Safeguarding and Promoting the Epirus Polyphonic Song', 2020, available at ich.unesco.org/en/BSP/polyphonic-caravan-researching-safeguarding-and-promoting-the-epirus-polyphonic-song-01611.

¹³⁵See Fragmentation Report, *supra* note 80, paras. 37–38.

¹³⁶See GC IV, *supra* note 26, Art. 27; International Committee of the Red Cross, 'Customary IHL' (ICRC Customary IHL), Rules 1 and 7.

¹³⁷See ICRC Customary IHL, *supra* note 136, Rule 14.

¹³⁸See Chainoglou, *supra* note 25, at 117.

States should take all appropriate measures to conduct their activities in such a manner as to protect cultural heritage, in conformity with customary international law and the principles and objectives of international agreements and UNESCO recommendations concerning the protection of such heritage during hostilities.

The reference to treaties is open-ended and allows the possibility of including the 2003 Convention, adopted in the same session of the UNESCO General Conference, within its terms.

The Preamble to the 2003 Convention itself notes ‘the deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage’ and calls for ‘existing international agreements, recommendations and resolutions concerning the cultural and natural heritage [to be] supplemented by means of new provisions relating to the intangible cultural heritage’.¹³⁹ This sentiment is repeated in UNESCO’s 2004 Yamato Declaration, which stresses the importance of ‘integrated approaches’ by states in implementing UNESCO Conventions since ‘safeguarding intangible cultural heritage is as important as protecting tangible cultural and natural heritage’. It notes that while ‘tangible and intangible heritage ... are often interdependent’, the strengthening of intangible protections is important since, ‘there are countless examples of intangible cultural heritage that do not depend for their existence or expression on specific places or objects’.¹⁴⁰ Indeed, the implementation of the 2003 Convention by the Intergovernmental Committee and individual states indicates an erosion of a strict tangible/intangible divide, a ‘fluidity’ increasingly echoed in practice under other, tangible-centric UNESCO treaties as well.¹⁴¹ The impetus to consider the 2003 Convention’s obligations in a manner integrated with IHL comes from the nature of the Convention and the trend towards greater integration in international cultural heritage law. ICL provides a template for such integration. While the Rome Statute mirrors IHL in only criminalizing offences against cultural property,¹⁴² the ICC Office of the Prosecutor relies on the 2003 Convention and IHRL to expand the Statute’s applicability to intangible cultural heritage.¹⁴³ Its 2021 Policy on Cultural Heritage understands cultural heritage to include both ‘tangible and intangible forms’ and integrates an assessment of direct and indirect impact on intangible cultural heritage into its understanding of various international crimes.¹⁴⁴ An integrated understanding of the rules pertaining to culture and conflict is equally feasible under IHL.

Since concrete safeguarding measures depend on the characteristics of a specific form of heritage, it is for the state party to decide what integration with IHL will mean for each listed element. This is in keeping with the broad discretion provided to states under Article 11 of the 2003 Convention. At a level of abstraction, however, fulfilment of these obligations should require integration of intangible heritage within the meaning of ‘respect for ... religious convictions and practices ... manners and customs’, under Article 27 of GC IV; and integration with the cardinal principles of civilian protection in IHL – distinction, proportionality, and precautions¹⁴⁵ – in the same manner as protections for cultural property.¹⁴⁶

¹³⁹See Intangible Heritage Convention, *supra* note 10, Preamble.

¹⁴⁰UNESCO World Heritage Committee, Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Cultural Heritage, WHC-04/7 EXT.COM/INF.9 (25 November 2004).

¹⁴¹L. Lixinski, ‘Article 3(a) Relationship to Other International Heritage Instruments’, in Blake and Lixinski, *supra* note 68, at 112. See also *ibid.*, at 107–15; UNESCO World Heritage Committee, The World Heritage Convention and other UNESCO Convention in the Field of Culture, WHC-09/34.COM/5E (9 July 2010), paras. 32–33.

¹⁴²1998 Rome Statute of the International Criminal Court, 2187 UNTS 3, Arts. 8(2)(b)(ix), 8(2)(e)(iv).

¹⁴³ICC Office of the Prosecutor, ‘Policy on Cultural Heritage’, June 2021, paras. 7, 34.

¹⁴⁴*Ibid.*, paras. 15, 60–88.

¹⁴⁵N. Hayashi, ‘General Principles of International Humanitarian Law’, in D. Fleck (ed.), *Handbook of International Humanitarian Law* (2009), 81, 83; see ICRC Customary IHL, *supra* note 136, rule 15.

¹⁴⁶See Chainoglou, *supra* note 25, at 125.

Taking the elements on the Urgent Safeguarding List as a reference point, it appears that intangible cultural heritage's viability in armed conflict is threatened either through loss of tangible anchors, such as a space in which heritage manifests or objects and persons essential to its manifestation, or through irretrievable breakdown of intergenerational transmission.¹⁴⁷ Each of these threats can be addressed by integrating intangible cultural heritage into existing IHL rules. While the majority of states today are bound by the 2003 Convention and the principal IHL treaties, such an integrated interpretation is not (yet) common practice. It is, however, the only interpretation capable of balancing the objectives of both regimes.

4.2.2.1 Safeguarding immovable anchors. In the case of intangible cultural heritage anchored to tangible sites, these spaces often do not have independent cultural value and fall out of the scope of IHL protections for cultural property. For example, the cultural space of Palenque de San Basilio in Colombia, proclaimed as a Masterpiece in 2005 and now on the Representative List, was founded as a walled community of escaped slaves.¹⁴⁸ Today physically 'resembling any other . . . Colombian village',¹⁴⁹ it does not meet the criteria for inscription on the World Heritage List, nor is it composed of 'movable or immovable property of great importance to the cultural heritage of every people' as required under the 1954 Hague Convention¹⁵⁰ and customary IHL.¹⁵¹ Nevertheless, the village is a site of congregation and a backdrop to 'social, medical and religious practices as well as musical and oral traditions, many of which have African roots', as well as a 'palenquero language, the only creole language in Latin America with a lexical Spanish basis and grammatical characteristics of Bantu languages'. Without the physical site, the only place where this language is taught and where the community's practices are the social norm, it is unlikely that associated cultural heritage will survive. The 'armed conflict between Colombian paramilitary and local guerrilla groups' remains one of the biggest threats to this cultural space.¹⁵²

Under current practice, there is nothing to suggest that Palenque de San Basilio is protected under IHL as anything but civilian property. An integrated interpretation of Colombia's obligations under the 2003 Convention with its obligations as a party to the 1954 Convention, would bring the village within the meaning of immovable 'cultural property'. Armed forces would have to apply the principle of distinction not only between a military objective and the village as civilian property, but between any other civilian property and this space which houses listed cultural heritage. This is identical to the distinction that would apply if the village were home to a monument on the lists under the World Heritage Convention or the 1954 Hague Convention, or even an unlisted monument.

The implications of this second-order distinction are significant. The general prohibition on targeting civilians and civilian property renders Palenque de San Basilio immune from direct attack, as long as it is not used for military purposes.¹⁵³ However, a distinction that recognizes its cultural value would restrict use for military purposes, while no such restriction exists for civilian property.¹⁵⁴

¹⁴⁷UNESCO Urgent Safeguarding List, 'Traditional Vallenato Music of the Greater Magdalena Region: Colombia', 2015, available at ich.unesco.org/en/USL/traditional-vallenato-music-of-the-greater-magdalena-region-01095; 'Shadow Play: Syrian Arab Republic', 2018, available at ich.unesco.org/en/USL/shadow-play-01368; 'Glasoechko, Male Two-Part Singing in Dolni Polog: North Macedonia', 2015, available at ich.unesco.org/en/USL/glasoechko-male-two-part-singing-in-dolni-polog-01104; 'Ojkanje Singing: Croatia', 2010, available at ich.unesco.org/en/USL/ojkanje-singing-00320.

¹⁴⁸UNESCO Representative List, 'Cultural Space of Palenque de San Basilio: Colombia', 2008, available at ich.unesco.org/en/RL/cultural-space-of-palenque-de-san-basilio-00102.

¹⁴⁹S. Romero, 'A Language, Not Quite Spanish, With African Echoes', *New York Times*, 18 October 2007, available at www.nytimes.com/2007/10/18/world/americas/18colombia.html.

¹⁵⁰See 1954 Hague Convention, *supra* note 6, Art. 1(a).

¹⁵¹See ICRC Customary IHL, *supra* note 136, rule 39.

¹⁵²UNESCO Representative List, 'Cultural Space of Palenque de San Basilio: Colombia', 2008, available at ich.unesco.org/en/RL/cultural-space-of-palenque-de-san-basilio-00102.

¹⁵³See ICRC Customary IHL, *supra* note 136, rules 1 and 7.

¹⁵⁴*Ibid.*, rule 39; see Lostal, *supra* note 88, at 65.

Even if used for military purposes, it would not be treated as a military objective, as in the case of civilian property used for military purposes. Instead, a heightened standard of ‘imperative military necessity’ would need to be met before it could be directly attacked.¹⁵⁵ Considerations of proportionality would disallow collateral damage in the course of attacks on nearby military objectives, unless the military advantage was proportionate to cultural loss and not merely to the more easily quantifiable loss of civilian property.¹⁵⁶ With cultural heritage, since ‘elements of this heritage are often irreplaceable, only the anticipation of very considerable concrete and direct military advantage, in many cases overwhelming, will in practice suffice to justify an attack likely to cause incidental damage’.¹⁵⁷ It would also require attacking forces to take ‘all feasible precautions’ to minimize incidental damage. While this obligation exists even if the village is treated as civilian property,¹⁵⁸ in terms of degree, the obligation would be heightened and ‘special care’ called for if classified more appropriately as cultural property.¹⁵⁹

4.2.2.2 Safeguarding movable anchors. In the case of intangible cultural heritage centred around movable objects, some of these objects could, theoretically, be protected under the 1954 Convention as ‘movable . . . property of great importance to the cultural heritage of every people’, a rule now part of customary IHL.¹⁶⁰ There is debate regarding whether ‘every people’ indicates that the property must be important to all humanity or only to a specific group. The former inference would exclude most movable property associated with intangible cultural heritage. Since intangible manifestations are themselves defined by reference to a specific group, so are their accoutrements. Under the 2003 Convention, the importance to humanity derives indirectly from the contribution to global cultural diversity. However, even if the interpretation of ‘every people’ is taken to mean ‘of each respective people’ as urged by some commentators,¹⁶¹ state practice under the 1954 Convention does not indicate that property associated with living cultures and practices is, in fact, protected. In periodic implementation reports under the 1954 Convention, while ‘tens of thousands’ of immovable properties are listed as protected, only two of the 133 parties, Bulgaria and the UK, cite any figures relating to protected movable properties and these refer ‘to the contents of between 100 and 250 museums, art galleries, libraries, and archives’.¹⁶²

The impact of armed conflict on the Rabinal Achí dance drama of Guatemala illustrates this point. This dynastic Mayan drama, dating to the fifteenth century, was almost driven to extinction through destruction of masks, costumes, and musical instruments essential to its performance by military forces in the Guatemalan Civil War, as ‘[t]hese objects were not considered by the military forces . . . as meeting the definitions of cultural property or the cultural and spiritual heritage of peoples under Article 1 of the 1954 Convention and Article 16 of [AP II]’, which were the applicable IHL protections in that conflict.¹⁶³ The Rabinal Achí was proclaimed a Masterpiece in 2005 and is now inscribed on the Representative List.¹⁶⁴ Integration of states’ obligations under the 2003 Convention with IHL would require movable property associated with such listed intangible heritage to be included within the interpretation of ‘property of great importance to the cultural heritage of every people’,¹⁶⁵ and to be protected under the 1954 Convention and other applicable IHL rules.

¹⁵⁵See ICRC Customary IHL, *supra* note 136, rule 38.

¹⁵⁶See Lostal, *supra* note 88, at 66.

¹⁵⁷R. O’Keefe, ‘Protection of Cultural Property’, in Fleck, *supra* note 145, at 490.

¹⁵⁸See AP I, *supra* note 26, Art. 57(2)(a)(ii); ICRC Customary IHL, *supra* note 136, rule 15.

¹⁵⁹See ICRC Customary IHL, *supra* note 136, rule 38; O’Keefe, *supra* note 157, at 489–90.

¹⁶⁰See 1954 Hague Convention, *supra* note 6, Art. 1(a); ICRC Customary IHL, *supra* note 136, rule 39.

¹⁶¹See O’Keefe, *supra* note 157, at 479.

¹⁶²*Ibid.*, at 481.

¹⁶³C. Johannot-Gradis, ‘Protecting the Past for the Future: How Does Law Protect Tangible and Intangible Cultural Heritage in Armed Conflict?’, (2015) 97 *International Review of the Red Cross* 1253, 1267.

¹⁶⁴UNESCO Representative List, ‘Rabinal Achí Dance Drama Tradition’, 2008, available at ich.unesco.org/en/RL/rabinal-achi-dance-drama-tradition-00144.

¹⁶⁵See 1954 Hague Convention, *supra* note 6, Art. 1(a).

4.2.2.3 Protecting heritage-bearers and intergenerational transmission. In the case of intangible cultural heritage anchored to heritage-bearers and intergenerational transmission, it is the loss of individual lives and opportunities for transmission between persons that is critical. While heritage-bearers, like all civilians in conflict, are protected from direct attack, such protection does not account for the importance of their cultural knowledge to the cohesion of their communities and to global cultural diversity. Incidental loss of civilian life is not absolutely prohibited and can be justified if sufficient precautions were taken and the loss was proportionate to the military advantage gained.¹⁶⁶ If the irreparable loss of intangible cultural heritage is included in such a calculus, however, it raises the threshold of expected military advantage that can justify such loss.

Such a narrowing of the scope of permissive action under IHL is already called for by IHRL, a regime whose co-applicability with IHL has been more closely scrutinized and whose norms overlap with or add nuance to a heritage-integrated reading of IHL. Aspects of the right to take part in cultural life and the right to education, for instance, have continued applicability during conflict and are closely linked with safeguarding conflict-affected communities' heritage.¹⁶⁷ Rights relating to religion and minority protection have been relevant where groups have found elements of their heritage under attack, due to its nexus with their distinct identity.¹⁶⁸ Even the freedoms of expression and assembly,¹⁶⁹ the right to private and family life¹⁷⁰ and the right to property have been invoked to modify the scope of permissive military action during armed conflict in relation to intangible cultural heritage.¹⁷¹ To some extent, integrating the 2003 Convention's Article 11 safeguarding obligations with IHL in relation to heritage communities may call for no more than is already required under IHRL. However, certain aspects of the 2003 Convention's system have no equivalent in IHRL, being specifically envisaged for the context of intangible cultural heritage with particular attention paid to heritage-bearers and processes of transmission.

The Preamble to the 2003 Convention notes that 'in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity'. While the Convention does not delve into this further, UNESCO has previously done so. The 'Living Human Treasures' programme, discontinued when the 2003 Convention entered into force, 'encourag[ed] Member States to grant official recognition to talented tradition bearers and practitioners, thus contributing to the transmission of their knowledge and skills to the younger generations'.¹⁷² A number of countries including France, Japan, Korea, and the Czech Republic introduced designations and identified individuals fitting this description.¹⁷³ Even today, a number of listed elements identify a small and usually diminishing number of individuals who are critical to transmission. North Macedonia's nomination form for inscribing the male two-part singing tradition, Glasoechko, on the Urgent Safeguarding List identifies the name of a family, whose three male members are 'the only remaining group that is aware of the importance of the specifics and the uniqueness of

¹⁶⁶See ICRC Customary IHL, *supra* note 136, rules 14 and 15.

¹⁶⁷E.g., CESCR, Concluding Observations on the Fourth Periodic Report of Israel, UN Doc. E/C.12/ISR/CO/4 (12 November 2019), para. 71; UN Human Rights Council, Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol (Ukraine), UN Doc. A/HRC/36/CRP.3 (25 September 2017), paras. 182–201.

¹⁶⁸E.g., CCPR, Concluding Observations on the Fifth Periodic Report of Sudan, UN Doc. CCPR/C/SDN/CO/5 (19 November 2018), para. 50(b); CCPR, Concluding Observations on the Eighth Periodic Report of the Russian Federation, UN Doc. CCPR/C/RUS/CO/8 (1 December 2022), paras. 38, 39(d).

¹⁶⁹E.g., 'Concluding Observations on the Eighth Periodic Report of the Russian Federation', *supra* note 168, paras. 28–29, 32–34, 38–39.

¹⁷⁰E.g., *Sargsyan v. Azerbaijan*, Judgment of 16 June 2015, [2015] ECHR, paras. 243, 257, 260.

¹⁷¹E.g., *Case of the Moiwana Community v. Suriname*, Judgment of 15 June 2005, [2005] IACHR (Ser. C. No. 124), paras. 131–135.

¹⁷²UNESCO, 'Living Human Treasures: A Former Programme of UNESCO', available at ich.unesco.org/en/living-human-treasures.

¹⁷³UNESCO, 'Guidelines for the Establishment of National "Living Human Treasures" Systems', 3.

the Glasoechko singing'.¹⁷⁴ The tradition has been in decline since the 2001 civil war, with 'no recordings' and 'seems to verge on extinction'. Were conflict to re-emerge, Glasoechko would be irretrievably lost without special protection for the lives of these heritage-bearers. Similarly, in Kyrgyzstan's nomination form for inscribing its epic trilogy, Manas, Semetey and Seytek, on the Representative List, it identifies 15 persons who are 'the most prominent epic tellers'.¹⁷⁵ The loss of their lives would have a deep impact on the viability of this epic, which is seen as 'express[ing] the historical memory of the Kyrgyz people'.¹⁷⁶

Given the availability of processes for identifying individual heritage-bearers in many instances, it is reasonable to require states to factor this information into military operations. A second-order distinction between combatants, civilians, and 'civilians plus' – specially-protected civilians – has been theorized in the context of humanitarian actors.¹⁷⁷ Such distinction is called for by an integrated reading of the 2003 Convention and IHL, requiring additional precautions and a higher threshold of proportionality to minimize incidental loss of life of heritage-bearers.

Unlike immovable sites, individuals may be difficult to locate or identify in conflict and opportunities for intergenerational transmission harder to recreate. The Convention's structural solutions to this in peacetime are relevant in armed conflict as well. The Operational Directives require state parties to set up '[c]ommunity centres and associations that are created and managed by communities [which] themselves can play a vital role in supporting the transmission of intangible cultural heritage'.¹⁷⁸ Where such centres are associated with listed intangible cultural heritage, an integrated reading of 2003 Convention obligations compels their protection as 'cultural property' under the 1954 Hague Convention or customary IHL, for as long as they are in regular use by heritage-bearing communities, despite these sites lacking standalone cultural value.

Security Council Resolution 2347 urges greater use of safe havens, including cross-border safe havens, for tangible cultural heritage.¹⁷⁹ This legal status should be extended to include centres for safeguarding intangible heritage of displaced populations, which already exist in both physical and digital formats in the refugee and humanitarian assistance context and have been utilized to great effect in the Ukrainian conflict.¹⁸⁰ In addition, it is possible to imagine physical centres, if protected as cultural property, serving as *de facto* refuges for heritage-bearers and communities who habitually interact there in the same way as 'improvised refuges' for movable cultural property, which are themselves protected under the 1954 Hague Convention.¹⁸¹ Such protection is in addition to protections for heritage-bearers, independent of their association with these centres. As with other cultural property, this integrated reading prohibits states from targeting or using such centres for military purposes, for as long as they act as refuges or are in regular use for transmission of heritage, unless there is imperative military necessity.

Just as the 1954 Convention permits states 'to display on such refuge the distinctive emblem' of the Convention, the emblem of the 2003 Convention too should be authorized for use to safeguard specially-protected community centres and individuals within it during an armed conflict. The Operational Directives support such use, stating that:

¹⁷⁴UNESCO Urgent Safeguarding List, 'Glasoechko, Male Two-Part Singing in Dolni Polog', 2015, Nomination file 01104, 2.

¹⁷⁵UNESCO Representative List, 'Kyrgyz Epic Trilogy: Manas, Semetey, Seytek: Kyrgyzstan', 2008, Nomination file 00876, 2.

¹⁷⁶*Ibid.*

¹⁷⁷R. Sutton, 'Enacting the "Civilian Plus": International Humanitarian Actors and the Conceptualization of Distinction', (2020) 33 *Leiden Journal of International Law* 429, 447.

¹⁷⁸See Operational Directives, *supra* note 67, para. 108.

¹⁷⁹See A. Jakubowski, 'International Protection of Cultural Heritage in Armed Conflict: Revisiting the Role of Safe Havens', 16(2) *Indonesian Journal of International Law* 169.

¹⁸⁰Saving Ukrainian Cultural Heritage Online, available at www.sucho.org/; Rohingya Cultural Memory Centre, available at rohingyaculturalmemorycentre.iom.int/. See E. Campfens et al., *Research for CULT Committee – Protecting Cultural Heritage from Armed Conflicts in Ukraine and Beyond* (European Parliament, Policy Department for Structural and Cohesion Policies, Brussels, 2023), 34, 64.

¹⁸¹See 1954 Hague Convention, *supra* note 6, Art. 11.

[c]ommunities . . . are encouraged to use the emblem of the Convention with regard to their activities and special events to safeguard and promote their cultural heritage inscribed on the [lists].¹⁸²

Intangible cultural heritage is also frequently associated with specific periods of time when communities come together. Precautions under IHL already require military operations to be planned in a manner that avoids civilian congregations coming under attack. Given the importance and fragility of listed heritage, military operations should also be planned, as far as possible, to allow such heritage to continue unobstructed in the customary time to foster intergenerational transmission. Precedents exist for this, although not in pursuance of legal obligations. For instance, at the height of the siege of Dubrovnik in February 1992, the festival of St Blaise, which today is on the Representative List, was carried out amidst the fighting, although in a subdued fashion,¹⁸³ proving important to the morale of the population and ensuring continuity of an 800-year-old tradition.¹⁸⁴

This integration of the 2003 Convention with IHL rules on civilian protection and cultural property may reach its natural endpoint where considerations of military necessity intervene, in the same way that this acts as the limiting factor in legal protections for tangible cultural heritage.¹⁸⁵ While the application of this principle to cultural heritage has been criticized,¹⁸⁶ it highlights the inbuilt checks ensuring that an integrated reading of the 2003 Convention equalizes protections for the two forms of heritage only within the bounds of the existing balance between the legal regimes of culture and conflict.

5. Conclusion

The impact of armed conflict on cultural heritage, both tangible and intangible, is frequently devastating and irreversible. The physical damage to lives and property, the disruption of lifestyles and the dispersal of communities can have seismic consequences for heritage in surprisingly short periods of time, with reverberations long after. The loss of heritage, if unaddressed, can lead to a loss of individual and group identity, leaving survivors adrift without familiar patterns of life and community to fall back on. It was in recognition of the gravity of cultural loss that protections for cultural heritage in armed conflict were first formulated under international law. Since then, these protections have expanded beyond armed conflict into peacetime, with the World Heritage Convention and the Intangible Heritage Convention reconceptualizing protections through the introduction of international lists and emergency funds.

However, protections remain disproportionately centred around tangible cultural heritage. Multiple treaties and customary rules govern the protection of tangible heritage in war and peace, while the Intangible Heritage Convention remains the sole repository of direct legal protections for its subject matter, despite both forms of heritage being recognized as equally valuable and fragile. While civilian protections under IHL and human rights that pertain to culture, education, non-discrimination, religion and minority protection may provide some discrete protection to intangible cultural heritage, they are far from comprehensive in capturing all aspects or forms of such heritage and do not provide a secure legal basis for its protection. The Intangible Heritage

¹⁸²See Operational Directives, *supra* note 67, para. 139.

¹⁸³Dubrovnik Tourist Board, 'Dubrovnik Musket-bearing Guard of Honour', available at https://tzdubrovnik.hr/lang/en/get/price_iz_davnina/1641/dubrovnik_musketbearing_guard_of_honour.html#.

¹⁸⁴UNESCO Representative List, 'Festivity of Saint Blaise, the Patron of Dubrovnik', 2009, available at ich.unesco.org/en/RL/festivity-of-saint-blaise-the-patron-of-dubrovnik-00232; *Ibid*, Nomination file 00232, 3–6.

¹⁸⁵E.g., 1954 Hague Convention, *supra* note 6, Art. 4(2).

¹⁸⁶E.g., J. H. Merryman, 'Two Ways of Thinking about Cultural Property', (1986) 80(4) *American Journal of International Law* 831, 835; A. Lopes Fabris, 'Military Necessity under the 1954 Hague Convention', (2015) 2(1) *Santander Art and Culture Law Review* 275.

Convention, as a treaty intended to encompass the collective, intergenerational and process-based aspects of such heritage, shoulders the primary responsibility for its protection in all manner of situations, including the specific challenges of armed conflict. Its broad wording and flexible performance obligations, when integrated with existing IHL protections, may be sufficient for the task. This article presents one vision of what integrated obligations of cultural protection in armed conflict could be. Nevertheless, an authoritative statement on what compliance with the Intangible Heritage Convention means during armed conflict is lacking. While this lack of specificity may be natural in a treaty with a wide ambit, its Operational Directives provide guidance on various other aspects of implementation but remain unjustifiably ambiguous on this point. Clarity regarding states parties' obligations in armed conflict is long overdue.